IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.593 OF 2001.

Anil Narayan Mhatre,
Hindu, Indian Inhabitant,
aged 47 years, Occ.: Service,
resding at 203, Kishore Kunj,
Adarsh Nivas, Mendra, Thane (E). .... Appellant.

Versus.

Smt.Megha Anil Mhatre,
Hindu, Indian Inhabitant,
aged about 42 year, Occ.:
Housewife, residing at 219,
Radhanagar, Manpada, Dombivali
(East), Dist.Thane,
C/o.Abhaya Manohar Naik,
Sandhya Apartment, near
S.T.Stand, Panvel, 421 206. .... Respondent.

Shri M.D.Angal for the Appellant.

Shri P.N.Karlekar for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 4th May, 2005.

ORAL JUDGMENT.

1. On 24th February 2003, the Second Appeal was admitted by this Court by framing following substantial questions of law:

(i) Whether the second appeal filed by the present appellant is tenable in law, which

arises from the Hindu Marriage Petition, which was decided by the Civil Judge, Sr.Dn., in view of the notification issued under section 3(b) of the Hindu Marriage Act and when in the absence of such notification the matter could have been heard by the District Judge and the First Appeal could have come before the High Court?

(ii) Whether as a result of vesting powers of the District Judge in view of the notification under section 3(b) of the Hindu Marriage Act in the Civil Judge, Senior Division, the party gets a right to prefer second appeal in contradistingtion with the fact that when the matter is decided by the District Judge in the absence of the notification under section 3(b), and/or Family Courts have been established, the party gets a right of first appeal before the High Court and when the notification under section 3(b) is issued the party gets a right of Second Appeal before the High Court. Whether such

different remedies are possible under the Hindu Marriage Act, in the facts and circumstances of the case and in view of the notification issued under section 3(b)?

(iii) Whether First Appellate Court was justified in granting maintenance at the rate of Rs.2,000/- per month as alimony when the wife's petition for divorce under section 13(1)(a) of the Hindu Marriage Act is dismissed ?

2. I have accordingly heard the learned Counsel appearing for the parties on the aforesaid substantial questions of law. Shri Angal the learned Counsel appearing for the Appellant has made submissions on merits of the Decree. Though substantial question of law is not framed touching the merits of the controversy involved in the Second Appeal, I have considered the submissions made by Shri Angal in that behalf.

3. With a view to appreciate the submissions made by the learned Counsel appearing for the parties, it will be necessary to refer to the facts of the case. The Appellant is the husband and the Respondent is the wife.

The marriage between the parties was solemnised on 23rd May 1992. The marriage between the parties was an arranged marriage which was performed in accordance with the Hindu vedic rites. The case of the Appellant is that after the marriage he took the Respondent for a trip to Goa for six days from 9th June 1992 to 14th June 1992. The case of the Appellant is that right from the beginning the attitude of the Respondent was indifferent. His case is that whenever any attempt was made for having sexual intercourse, the Respondent refused to have the same on one or the other pretext. After the marriage, the Appellant's mother noticed that the Respondent did have any monthly menstrual period. The case of the Appellant is that due to genital defects in the Respondent, there was no development of uterus or the genital track and the internal organs. The case of the Appellant is that the Respondent was incapable of having sexual intercourse and this fact was suppressed by the Respondent and her mother.

4. The further case of the Appellant is that the Respondent insulted the Appellant. According to the Appellant the Respondent refused to do any household work in the matrimonial home. The Appellant was posted at Madras for temporary period of about two months.

Since the Appellant left for Madras the Respondent left the matrimonial home and started staying with her mother. The case of the Appellant is that the Respondent tried to commit suicide. The Respondent always demanded separate residence. As the Appellant expressed inability to stay away from his mother and sister who were dependent on him, the Respondent started humiliating him. The Respondent started making allegations against the Appellant that he is impotent. Therefore, the Appellant consulted a Doctor to negative the doubt created by the Respondent. When the Respondent was examined by a Gynaecologist it was revealed that the Respondent was not in a position to conceive as her uterus was not at all developed. The Appellant contended that the marriage could not be consumated owing to the physical defect of the Respondent. The allegations made by the Respondent affected the health of the Appellant. The Respondent tried to involve the Appellant in a criminal case. Therefore, the Appellant filed a petition contending that he was deceived by the Respondent and the physical incapacity of the Respondent was suppressed by the Respondent and her mother. The Petitioner, therefore, filed a petition for declaration under section 12 of the Hindu Marriage Act, 1955, that the marriage between the

Appellant and the Respondent was a nullity. In the alternative the Appellant contended that the marriage may be dissolved under section 13(1)(i)(a) of the Hindu Marriage Act 1955.

5. The Respondent contested the petition by filing a detailed Written Statement. The Respondent contended that the marriage was consumated. She contended that the allegation regarding impotency was utterly false. The Respondent contended that she was ill-treated in the house of the Appellant as she hails from a poor family and as her parents had not given adequate gifts to the Appellant at the time of marriage. The Respondent pointed out that she was subjected to cruelty at the hands of her mother-in-law and sister-in-law. She contended that the sister-in-law was getting salary of Rs.10,000/- per month and the mother-in-law was getting pension of Rs.1000/- per month and therefore, they were not dependent on the Appellant. The Respondent denied all the allegations.

6. The learned trial Judge allowed the petition and passed a decree of divorce on the ground of cruelty. However, the learned Judge held that the Appellant has failed to prove that the Respondent is physically unfit

for consumating the marriage. The learned trial Judge awarded permanent alimony at the rate of Rs.1000/- per month in favour of the Respondent. An Appeal was preferred by the Respondent to the District Court. The learned 2nd Additional District Judge, Thane, allowed the said Appeal by impugned Judgment and Decree dated 4th April 2001. The learned Judge dismissed the petition filed by the Appellant and enhanced the permanent alimony fixed by the learned trial Judge by fixing the same at Rs.2500/- per month.

7. Shri Angal, the learned Counsel appearing for the Appellant has invited my attention to various findings recorded by the Appellate Court. He has raised strong objection to the language and phraseology used by the learned Additional District Judge in certain paragraphs of the impugned Judgment. He submitted that the view taken by the Appellate Court is perverse. He submitted that while setting aside the decree passed by the trial Court for divorce the learned Additional District Judge ought to have set aside the decree for permanent alimony passed by the trial Court. He submitted that there is no jurisdiction vesting in the Court to grant permanent alimony without passing a decree for divorce. About the tenability of the Second Appeal he placed reliance on

the decision of the Division Bench of this Court reported in AIR 1960 Bombay page 42 (Gangadhar Rakhamaji v/s. Manjulal Gangadhar) and 1984 Mah.L.J. page 34 (Madhavi Madhukar Kulkarni v/s.Madhukar Ramchandra Kulkarni) and submitted that the Appeal preferred by the Appellant in the District Court was maintainable and therefore, the Second Appeal before this Court was maintainable.

8. Shri Karlekar, learned Counsel appearing for the Respondent, supported the impugned Judgment and Decree by pointing out various findings. He submitted that the findings recorded by the Appellate Court were the findings of fact and no interference can be made under section 100 of the Code of Civil Procedure, 1908. In so far as the maintainability of the Second Appeal is concerned, the learned Counsel for the Respondent has not seriously opposed the submissions made by the learned Counsel appearing for the Appellant. Shri Karlekar fairly stated that in view of the law laid down by the Apex Court decree of permanent alimony could not have been passed while dismissing the petition filed by the Appellant.

9. I will have to first deal with the submissions made

on the first two substantial questions of law. There is no dispute that the learned third Joint Civil Judge, Senior Division, who decided the petition for divorce was empowered to entertain and decide the said petition in view of the notification issued under section 3(b) of the said Act of 1955. Now the question before me is firstly whether an Appeal was maintainable against the Judgment and Decree passed by the learned 3rd Civil Judge, Senior Division, in the District Court or whether the Appeal ought to have been filed in this Court. In view of the decision of the Division Bench of this Court in the case of Gandhadhar (supra), this question is no longer res-integra. In the case before the Division Bench the Appellant had filed a petition for divorce in the Court of the Civil Judge, Senior Division at Ahmednagar. The petition was dismissed and the first Appeal was preferred by the Appellant in this Court under section 28 of the said Act of 1955. In paragraph 2 of the decision the Division Bench observed that the first question to be decided was whether Appeal to this Court was competent when the petition was filed and decided by the Court of the Civil Judge, Senior Division. In paragraph 3 the Division Bench answered the said question. The Division Bench held that:

> ".....The Court of the Civil Judge, Senior Division, therefore, which is notified by the State Government as having jurisdiction in matters dealt with under the Hindu Marriage Act, is a "district court" within the definition of section 3(b) of the Hindu Marriage Act, but it is not the principal civil court of original jurisdiction, nor does it exercise its jurisdiction as such principal civil court of original jurisdiction. Section 28 of the Hindu Marriage Act leaves the forum of appeal to be determined under the law for the time being in force which, in the present case, is the Bombay Civil Courts Act. The forum of appeal from the order or decree of the Court of the Civil Judge, Senior Division, under the Bombay Civil Courts Act is the Court of the District Judge of the District. In the present case, therefore, which was decided by the Civil Judge, Senior Division, the appeal lies to the Court of the District Judge and not to the High Court."

10. In view of the clear pronouncement of law by the

Division Bench, the Appeal preferred by the Respondent in the District Court was maintainable. At this stage reference will have to be made to another decision of the Division Bench of this Court in the case of Madhavi Madhukar Kulkarni (supra). The issue before the Division Bench was when the original petition for divorce under the said Act of 1955 was heard and decided by the Second Extra Assistant Judge whether the First Appeal will lie to this Court or to the Court of the District Judge. In paragraph 8, the Division Bench held that whenever a petition under the said Act of 1955 is heard and decided by a Court of the Civil Judge, Senior Division, an Appeal lies to the District Court and when petition is decided by the Assistant Judge, the Appeal will lie to the High Court against the decree passed by the Assistant Judge. In view of what is held by the two Division Benches of this Court, in my view the Appeal in the District Court was maintainable against the decree passed by the Civil Judge, Senior Division. Therefore, this Second Appeal against the Appellate Decree is maintainable.

11. In so far as the grant of permanent alimony is concerned, the Apex Court in a decision reported in (1993) 3 SCC page 406 (Chand Shawan v/s. Jawaharlal

Dhawan) held that under section 25 of the said Act of 1955, a decree for permanent alimony can be passed in a petition for divorce only when the marriage is dissolved by a decree of divorce and the decree cannot be passed for permanent alimony when the petition is dismissed. Therefore, when the learned Additional District Judge allowed the Appeal filed by the Respondent/wife and dismissed the petition for divorce filed by the Appellant/husband, the decree for permanent alimony ought to have been set aside. Instead of setting aside

the decree the learned Appellate Judge enhanced the amount of permanent alimony. If the decision of the learned Additional District Judge dismissing the petition for divorce is legal and valid, the decree for permanent alimony passed by the Courts below will have to be quashed and set aside. However, the Respondent can always apply for maintenance under the appropriate provisions of law.

12. In so far as the merits are concerned, the trial Court negatived the main plea of the Appellant that the marriage was a nullity. The learned trial Judge accepted the prayer made by the Appellant in the alternative and passed a decree on the ground of

cruelty. The learned trial Judge held that the fact that the Respondent is unable to conceive a child amounts to causing mental cruelty to the Appellant/husband. The trial Court also held that the wrong representation made by the Respondent's mother that the Respondent had passed S.S.C.Examination also caused mental cruelty. The learned trial Judge held that the allegation of demand of dowry against the Appellant and his mother without proving the same was also a mental cruelty. Lastly the learned trial Judge held that the insistence of the Respondent-wife that the husband should stay separately with her was an unreasonable expectation and has caused mental cruelty.

13. From the submissions of the learned Counsel appearing for the parties recorded by the Appellate Court, it appears that the Appellant supported the decree of the trial Court of divorce and did not contend that the decree of nullity ought to have been granted.

14. The Appellate Court examined the evidence and especially the evidence of Dr.Mrs.Pathare, a Gynaecologist. The Appellate Court found that Dr.Mrs.Pathare clearly deposed that the Respondent was not impotent. Dr.Pathare also deposed that though

uterus of the Respondent not fully developed, if proper treatment is provided the defect can be cured and can give birth to a child. During the cross-examination of Dr.Pathare it was suggested to her that the Respondent is still virgin and Dr.Pathare denied the correctness of the said suggestion. The Appellate Court accepted the evidence of the Respondent that the Appellant and the Respondent had enjoyed sexual intercourse. The evidence of the Respondent was accepted in that behalf as there was corroboration to the said evidence by Dr.Pathare. Considering the evidence of the expert, the Appellate Court came to the conclusion that the case made out by the Appellant that the Respondent was incapable of conceiving a child was not correct. Perusal of the Judgment of the Appellate Court shows that the said finding of fact has been recorded on the basis of the evidence of an expert Gynaecologist who had examined the Respondent. The said finding cannot be said to be perverse by any stretch of imagination.

15. The Appellate Court accepted the case of the Respondent that the marriage was consumated in view of the categorical assertion by the Respondent on oath and in view of the findings of the Gynaecologist. The Appellate Court has noted that when the Appellant

himself came out with a case that he himself got examined by a Doctor who opined that the Appellant was not impotent, he should have examined the said Doctor. The learned Additional District Judge, therefore, held that the evidence of the Appellant cannot be accepted as a gospel truth.

16. The learned Additional District Judge held that only because the Respondent insisted that the Appellant should stay separately with her, it cannot be aground to come to the conclusion that mental cruelty was caused to the Appellant. The learned Appellate Court held that it was an admitted position that the Appellant was residing in two room kitchen flat which was purchased by the Appellant's sister and considering the fact that in a small flat the Appellant and the Respondent were staying with the mother and sister of the Appellant, the Respondent insisted for having a separate residence. The Appellate Court noted that it was the case of the Respondent that the Appellant's mother and sister were subjecting her to mental torture. The Appellate Court therefore, set aside the finding of the trial Court on the ground of cruelty.

17. In my view the said finding of fact recorded by the

Appellate Court is based on legal evidence on record and no interference can be made in a Second Appeal under section 100 of the said Code. The learned Appellate Judge has examined the documentary evidence in the form of a number of letters between the spouses and in between the relations and has held that from the correspondence it appears that the mother-in-law of the Respondent was dissatisfied with the gifts and/or offerings given by the Respondent's mother at various festivals. The Appellate Court held that considering the education of the Respondent, she has termed the said dissatisfaction as demand for dowry. The learned Appellate Court is right even on this aspect. In my view no fault can be found with the Appellate Court when the decree of divorce was upset.

18. It is to be noted here that there is some substance in the grievance made by Shri Angal the learned Counsel for the Appellant that the language used by the learned Appellate Court Judge in some of the paragraphs is objectionable. The learned Judge should have avoided the use of certain words and phraseology while writing the Judgment and he should have observed restraint. However, the fact remains that the learned Judge of the

Appellate Court has appreciated the entire oral and documentary evidence on record and the pleadings and has recorded findings of facts. There is no merit in the grievance of the Appellant regarding the said findings.

19. Hence the following order is passed:

(i) The Appeal is partly allowed. The decree passed by the Appellate Court by which the petition for divorce filed by the Appellant-husband was dismissed is confirmed.

(ii) The decree passed by the Appellate Court directing the Appellant-husband to pay alimony at the rate of Rs.2500/- is set aside. It will be open for the Respondent-wife to pray for maintenance/ alimony by filing appropriate proceedings.

(iii) Parties to bear their own costs.

Judge.